

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,)	
)	
	Respondent,	
)	
vs.)	No. SC85300
)	
JAMIE AVERY,)	
)	
	Appellant.	
)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF WEBSTER COUNTY, MISSOURI
FORTIETH JUDICIAL CIRCUIT
THE HONORABLE JOHN W. (BILL) SIMS, JUDGE**

APPELLANT’S SUBSTITUTE BRIEF

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TRANSFER QUESTION

The Southern District's opinion in this case creates a question of general interest and importance:

Whether evidence that a male attacker, who was bigger than the female defendant, who had to be forced to leave her secluded residence at gun point, who returned uninvited in the dead of the night to her residence and entered it, and who threatened to beat her, rushed at her, and grabbed her gun in an attempt to wrestle it away from her, was sufficient "to ignite a sudden passion in any reasonable person," justifying a voluntary manslaughter instruction.

By holding that the following evidence was "insufficient to ignite a sudden passion in any reasonable person" (Mem. Op. at 11) the Southern District's opinion in this case is contrary to previous opinions of this state. *State v. Redmond*, 937 S.W.2d 205, 208 (Mo.banc 1996); *State v. Fears*, 803 S.W.2d 605, 609 (Mo.banc 1991); *State v. Newlon*, 721 S.W.2d 89, 92 (Mo.App. E.D., 1986).

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JURISDICTIONAL STATEMENT

Appellant, Jamie Avery, appeals her convictions for murder in the second degree, Section 565.021, RSMo 2000,¹ and armed criminal action, Section 571.015, following a jury trial in the Circuit Court of Webster County, Missouri. Because Ms. Avery had no prior convictions, the jury recommended sentences of thirty years imprisonment on each count. On January 15, 2002, the trial court, the Hon. John W. (Bill) Sims, Judge, sentenced Ms. Avery to the sentences recommended by the jury, ordering the sentences to run consecutively. Ms. Avery filed a timely notice of appeal on January 16, 2002. Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Southern District. Article V, Section 3, Mo. Const.; section 477.060. This Court thereafter granted the Appellant's application for transfer, so this Court has jurisdiction. Article V, Sections 3 and 10, Mo. Const. and Rule 83.03.

¹ All statutory references are to RSMo 2000, unless otherwise indicated.

STATEMENT OF FACTS²

Ms. Avery was charged by information with murder in the first degree, Section 566.020 (Count I), and armed criminal action (Count II), Section, 571.015 (L.F. 6). On December 3-7, 2001, a jury trial was held in the Circuit Court of Webster County before the Hon. John W. (Bill) Sims, Judge, (L.F. 25-30). The following evidence was introduced at that trial.

Jamie Avery, Appellant, and John Hamilton lived together in the Hickory County town of Nemo, Missouri (Tr. 676-679, 769). In October 2000, Ms. Avery had a “one-night-stand” with Bruce Paris (the deceased) (Tr. 594-595, 683-86, 729-733, 775). The two of them had plans to make a trip to Chicago (Tr. 681-683, 729). However, Paris decided against it because he had rekindled a relationship with a former girlfriend (Tr. 595-597, 637). Ms. Avery was upset by this and made threats against Paris (Tr. 592-593, 604, 633). Paris left town with the former girlfriend (Tr. 596-597, 637). He told that girlfriend that Ms. Avery was a “psycho bitch” (Tr. 651).³

Paris returned to Missouri in December of 2000 and stayed in a camper in a friend’s driveway (Tr. 598-599, 639, 650). He made repeated harassing phone

² The Record on Appeal consists of 7 volumes of trial transcript (Tr.) and a legal file (L.F.). Some of the evidence set out here is taken from the memorandum opinion issued by the court of appeals.

³ Paris referred to lots of women as “psycho” or “psycho bitch” (Tr. 616, 990).

calls to Ms. Avery (Tr. 802-803). During Paris' last phone call to Ms. Avery, she told him to stop calling or she would notify the police (Tr. 804, 805, 806).

About a week after the last phone call, on December 6, 2000, Paris sent a message to Ms. Avery via a mutual friend, Regina Buckner, that he wanted to see Ms. Avery again (Tr. 600, 691-692, 724-725).⁴ After he set up the meeting, Paris mentioned to the friend that he had been staying with that he had not had sex in a couple of weeks (Tr. 616-617).

Buckner found Ms. Avery drinking at a local tavern and told her about Paris' message (Tr. 694, 696-698, 735-736, 747, 749). Ms. Avery reacted to this news by stating she did not want to have anything to do with him, she hated him, and she wished "it" never had happened (Tr. 696-697, 736). She was not "going to put up with any of his stuff anymore" (Tr. 755). She threatened to kill Paris if he came to her house (Tr. 699-700, 736, 759). She also quipped that Hamilton said she could "blow [Paris'] ass off" if he bothered her again (Tr. 749, 750).⁵ Buckner joked back that she had a knife under her seat waiting for him, too (Tr. 703, 737).

Later that evening, Ms. Avery and Buckner left the tavern to find Paris (Tr. 700-705, 737-738). After they finally met up with Paris, the three of them drove around drinking alcohol (Tr. 708-711, 723-724). Buckner and Paris smoked

⁴ Paris and Buckner had a long-term affair (Tr. 651, 664, 665, 666-667, 669, 734).

⁵ An owner/bar tender of the restaurant opined that it was just "bar talk" (Tr. 754).

marijuana (Tr. 708-711, 723-724). During the drive, Paris grabbed Ms. Avery's breast (Tr. 711). The three eventually stopped at Ms. Avery's house (Tr. 713). While there, Buckner phoned a friend, Becky Gibbs (Tr. 716, 742). After her phone call, she asked Ms. Avery to take her to her car (Tr. 716, 717). Paris stayed so that he could make a phone call (Tr. 718, 742). He phoned a friend and asked him to bring some things to work the next day because he would not be returning home that night (Tr. 600-601, 614-615).

It only took a minute or two for Ms. Avery to take Buckner to her car (Tr. 720). Buckner said that she would drive her car back to Ms. Avery's residence (Tr. 720). Ms. Avery returned to her house (Tr. 1037). But Buckner did not return; she never intended to do so (Tr. 720-721, 725). Instead, she went to Gibbs' house (Tr. 720-721, 742). After learning from Buckner that Ms. Avery had been with Paris at Ms. Avery's and Hamilton's home, Gibbs phoned Hamilton, who was in California at the time (Tr. 722, 726, 778, 800). Hamilton then called Ms. Avery and confronted her with this information (Tr. 778-779, 801, 806). Ms. Avery explained that she was only with Paris to tell him to leave them alone (Tr. 779, 806). There were other phone calls between Hamilton and Ms. Avery (Tr. 781-784).

Later that evening, Ms. Avery called Hamilton, screaming, “Oh, my God, I shot him,” and mentioned that Paris was going to hurt her (Tr. 786, 807, 808).⁶ Ms. Avery, who was hysterical, said something like, “I was scared. There was a struggle;” “He came at me and I shot him.” (Tr. 786, 807). She also mentioned that there had been a confrontation and he had threatened to hurt her (Tr. 807). She said she had been afraid of Paris (Tr. 788). She did not know if Paris was still there (Tr. 786-787). Hamilton told her to be sure and inform the police that she was extremely afraid of the dark (Tr. 788, 789).⁷

At approximately 9:09 p.m., Ms. Avery called the Hickory County Sheriff’s Department and while crying stated very hysterically, “I have shot an intruder.”

⁶ In an offer of proof, Paris’ former girlfriend testified that on June 16, 2000, while at her home, Paris picked her up, grabbed her hair, and threw her down the stairs out of her trailer (Tr. 655, 658). The trial court refused the offer of proof, ruling that there was no evidence that Ms. Avery was aware of the specific act of violence (Tr. 659). At sentencing, Ms. Avery complained that she was supposed to be asked questions “about what I knew about [Paris’] past and I was not allowed that opportunity” (Tr. 1224).

⁷ Hamilton testified that just two nights prior, when Hamilton had called Ms. Avery, she was hysterical because she was afraid of the dark (Tr. 788). As a result, she had been sleeping with Hamilton’s gun (Tr. 788). He showed her how to use it before he left, but she had not fired it (Tr. 810-811).

(Tr. 277-279, 283-284, 289-290). She had barricaded herself in a room; she did not know where the intruder was (Tr. 281). Law enforcement officers arrived at about 9:17 p.m. and found Paris dead and slumped in a sitting position against the open front door (Tr. 294-296, 298-300, 326-327, 356-358, 386). His body temperature indicated that his death was recent (Tr. 358). There was a significant amount of blood in the doorway, on the porch, and inside the residence, both surrounding the Paris' body and by a coffee table (Tr. 301, 305-307, 322-326, 328, 331, 343-344, 358, 517, 795). Ms. Avery told the officers that she had shot an intruder (Tr. 307-308, 313, 318, 340-41, 343, 347). She said that she had shot Paris and asked several times if he was dead (Tr. 361, 378, 422-423, 440). She was extremely upset and was crying (Tr. 343, 361, 419-423, 439, 440).

The police found a revolver sitting on the corner of a coffee table in the living room (Tr. 309-310, 311, 332, 351, 400, 401, 477, 488). The weapon had three live rounds, one empty chamber, and one spent casing inside it (Tr. 311, 351, 477-479). There also was a live round on the kitchen floor (Tr. 311-312, 364, 370, 398, 427). There was a photograph of Ms. Avery in Paris' shirt pocket (Tr. 364-366, 370). On the back of the photograph, Ms. Avery had written "To Bruce, Love ya naked. Love always, Jamie." (Tr. 364-366, 370).⁸

Hickory County Sheriff Ray Tipton transported Ms. Avery to the sheriff's department and took a five-page written statement from her (Tr. 423, 426). That

⁸ "Love you naked" was an expression used by Paris (Tr. 644, 723, 990).

handwritten statement related the following regarding the events immediately surrounding the shooting (Tr. 433-438; State's Exhibit No. 85). After Paris had left her residence, she got Hamilton's gun to go outside and walk the dog (Tr. 438). She got the gun because she is afraid of the dark (Tr. 438).⁹ She heard a noise and saw a figure walking toward her (Tr. 438). She was scared and ran inside but did not shut the door behind her (Tr. 438). She pointed the gun at the door (Tr. 438). It was Paris (Tr. 438). As she backed up, he came at her and said "put down the f---ing gun or I will beat your ass" (Tr. 438). He then grabbed the gun (Tr. 438). As he did so, Ms. Avery pulled away and pulled the trigger (Tr. 438). She then ran into the bedroom, barricaded herself inside, and tried to call for help (Tr. 438).

During the early morning hours of December 7th, Miles Parks, an investigator with the Missouri State Highway Patrol, met with Ms. Avery (Tr. 511-512). She said that as Paris approached her, he grabbed the gun and she pulled back and the gun went off (Tr. 516, 525, 530). When he came at her, he said, "If you don't put the gun down I'm gonna beat your ass." (Tr. 525). She had the gun in her left hand and he grabbed it with his right hand (Tr. 515, 535). She did not believe that the gun was cocked when he grabbed it (Tr. 535). She got the gun from the nightstand where she sleeps; she had it there because she was scared

⁹ Sheriff Tipton was aware that Ms. Avery was afraid of the dark because she had been gang-raped (Tr. 441-442).

and would take it with her outside in the evening when Hamilton was away (Tr. 535-536).

Parks visited the scene of the shooting and then returned to the sheriff's department to talk to Ms. Avery again (Tr. 519-520). Regarding the photograph found on Paris, Ms. Avery said that Mr. Paris had been looking at some photographs that had been on the coffee table, and she gave him one after writing the aforementioned inscription (Tr. 523, 534). She wrote that because it was an expression that Mr. Paris used (Tr. 534). She was not certain if Paris had made any phone calls from her residence (Tr. 524).

John Prine of the Missouri State Highway Patrol went to the scene during the early morning hours of December 7th to examine the blood spatter evidence (Tr. 492-496). Prine could not say with any certainty where the shot occurred because there was no impact stain (Tr. 497-498, 506). Prine told Miles Parks that the blood spatter was consistent with the explanation that had been provided by Ms. Avery (Tr. 499-500, 502, 527).

George Knowles, another investigator with the Missouri State Highway Patrol, took a recorded a statement from her, which lasted about ten minutes (Tr. 536-538, 545-546, 576-577; Defendant's Exhibit F). Ms. Avery told Knowles that she had not been totally truthful with the officers who were investigating the scene (Tr. 542). She said Paris had been in her home and that she had asked him to leave, but he refused (Tr. 542). He placed his foot in front of the door when she tried to open it (Tr. 542). She became scared of him because he would not leave,

so she retrieved a handgun from her bedroom (Tr. 542). She displayed it to Paris and ordered him to leave (Tr. 542). Later in the evening, she took her dog outside and saw movement (Tr. 542-543). She was scared so she ran inside (Tr. 543). Paris got onto the porch; she recognized him (Tr. 543). She pulled the handgun out from the waistband of her pants and told him to move (Tr. 543). Paris told her that she had better put the gun down or else he was going to kick her ass (Tr. 543). He made a movement towards her; she backed away and fired one shot (Tr. 543). He fell to the ground (Tr. 543). She dropped the gun and went into the bedroom where she called the police (Tr. 543). Ms. Avery also told Knowles that Paris had made a number of harassing telephone calls to her (Tr. 544-545, 583).

Evidence introduced at trial included that one of her hairs was found on Paris' hand (Tr. 454-455, 463, 470, 472, 905, 938-942, 948-955, 956); that hair still had the root on it (Tr. 955). There was no gunshot residue on either Paris' or Ms. Avery's hands (Tr. 975-978). Further evidence showed that Paris was only shot once (Tr. 875, 879-880, 888). The bullet entered his forearm, continued through his forearm, and then entered his neck (Tr. 467, 882-883, 893-894, 897, 964-965, 969-973). The entrance wound to the forearm appeared to be from a very close shooting, not in contact, but near contact or within a couple of inches (Tr. 974, 981). An autopsy revealed alcohol in his stomach (Tr. 906). Paris' pants were unzipped (Tr. 906).

Two former inmates who had been incarcerated with Ms. Avery after her arrest testified for the State (Tr. 820-821, 911, 914). One of the inmates testified

that Ms. Avery had told them that the shooting was exciting to her (Tr. 919, 920). She also testified Ms. Avery said she acted hysterical when the police came by crying and rubbing her eyes (Tr. 908, 918, 919). That inmate testified that Ms. Avery said that she and a friend were in a restaurant and had discussed the murder (Tr. 911, 917, 926-927).¹⁰ This inmate told an officer about this conversation when she was released from jail, “but they – they blew me off. They wouldn’t listen to me” (Tr. 920). She waited seven months before she put her version about the alleged conversation in writing (Tr. 921). She contacted her attorney with this information hoping that it would help her pending charges (Tr. 933). The other inmate testified that Ms. Avery told her that after she had asked Paris to leave her house, he came back after dark, and they wrestled over the gun and it accidentally went off (Tr. 825, 836). The State also produced two jailers who testified to parts of a conversation they overheard between Ms. Avery and some inmates (Tr. 844-845, 857). One jailer testified she heard the inmates, laughing as Ms. Avery talked about shooting Paris (Tr. 851, 859, 860). They heard Ms. Avery say, “What was I

¹⁰ Presumably that “friend” would have been state’s witness Buckner. Buckner testified that there were no plans to shoot Paris (Tr. 743). None of the employees at the restaurant who testified for the State testified that they heard of any plot between Ms. Avery and Buckner to kill Paris. Ms. Avery denied talking to the inmate about the shooting (Tr. 1066, 1112-1113, 1114).

supposed to do? So I just shut the door” (Tr. 851, 860); and, “What do you do with a guy like that? What do you do? You shoot him.” (Tr. 859, 864).

At trial, Ms. Avery testified that when she arrived at her home with Paris, she only gave him the photograph of herself because he promised he would leave her alone if she did (Tr. 1035-1036). She further stated that after returning to her home from taking Buckner to her car, Paris refused to leave her house (Tr. 1041-1044). She tried getting him to leave and when she tried opening the front door, he blocked the door with his foot (Tr. 1042).¹¹ He only left after she retrieved a gun (Tr. 1042-1044). About thirty minutes after he left, she took her dog outside (Tr. 1045). She took the gun with her because she was afraid of the dark (Tr. 1045-1046). She heard rustling in the bushes that she thought sounded like footsteps (Tr. 1047). She saw a figure so she ran into the house, leaving the front door open (Tr. 1048-1050). She heard someone walking up the steps, so she pointed the revolver at the doorway (Tr. 1050). She recognized him when he came to the door (Tr. 1050). He looked mad, said, “Put the f---ing gun down or else I’ll beat your f---ing ass.” (Tr. 1051, 1085). She did not drop the gun because she was “scared to death” (Tr. 1085). He came at her, not running, but not walking (Tr. 1051). He reached for the gun and she shot him (Tr. 1051). She did not want to shoot him (Tr. 1051). After the gun discharged, she dropped it and ran

¹¹ One of Paris’ ex-girlfriends testified that after they broke up, he would visit her and would refuse to leave (Tr. 989, 991).

into the bedroom (Tr. 1052). She was afraid that Paris might pick up the gun and come after her (Tr. 1053).

On cross-examination, when Ms. Avery was asked if she shot Paris accidentally or in self defense, she answered, “*I think* the gun went off accidentally. *I believe* the gun went off accidentally.” (Tr. 1084) (Emphasis added). When asked if she believed Paris was going to kill her, she replied, “He came at me grabbing for that gun. I don’t know what he was there for, but he came back to my home uninvited” (Tr. 1086).

Ms. Avery also testified that she and Hamilton had received several “crank type” phone calls from Paris between October and December 6, 2000 (Tr. 1009-1010). During the last call, which was about a week or a week and a half prior to December 6th, she told Paris to leave them alone or they would call the police (Tr. 1011).

After the foregoing evidence was presented, a jury instruction conference was held (Tr. 1117-1134). At that time, Ms. Avery submitted refused Instructions A, B, and C, which are set out in the argument section and the appendix to this brief (L.F. 127-131). Refused Instruction A was a self-defense instruction patterned after MAI-CR3d 306.06 (Tr. 1117; L.F. 127-128). Refused Instruction B was a defense of premises instruction patterned after MAI-CR3d 306.10 (Tr. 1118). Refused Instruction C was a voluntary manslaughter instruction patterned after MAI-CR3d 313.08 (Tr. 1118). Ms. Avery objected to the trial court not giving the refused instructions (Tr. 1128-1129). She contended that there was

evidence to support all three of those instructions (Tr. 1129). The trial court refused to give these three instructions (Tr. 1117-1118; L.F. 127-131).

The jury found Ms. Avery guilty of the lesser included offense of murder in the second degree and the related armed criminal action, recommending thirty years imprisonment on both counts (Tr. 1194; L.F. 134-135). The trial court granted Ms. Avery the full twenty-five days to file a motion for new trial, which was filed on December 26, 2002 (Tr. 1196; L.F. 30).

On January 15, 2002, the trial court overruled the motion for new trial (Tr. 1213) and sentenced Ms. Avery to consecutive sentences of thirty years imprisonment on each count (Tr. 1220-1221; L.F. 150-151).

On March 19, 2002, Ms. Avery timely filed a notice of appeal, in *forma pauperis* (L.F. 152-56; Tr. 1226). This appeal follows. Any further facts necessary for the disposition of this appeal will be set out in the argument portion of this brief.

POINTS RELIED ON

I.

The trial court erred in refusing to instruct the jury on voluntary manslaughter, Refused Instruction C, because the evidence injected the issue of “sudden passion arising from adequate cause” and gave the jury a basis to acquit Ms. Avery of second degree murder and find her guilty of voluntary manslaughter and therefore the trial court’s ruling deprived Ms. Avery of her rights to due process and a fair trial, as guaranteed by the 5th, 6th, and 14th Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that Paris had been harassing Ms. Avery; prior to the shooting she had to force him to leave her secluded residence at gun point; he returned uninvited in the dead of the night to her residence, entered it, and threatened to beat her; and, he then rushed at her and grabbed her gun in an attempt to wrestle it away from her. This evidence was sufficient “to ignite a sudden passion in any reasonable person,” justifying a voluntary manslaughter instruction.

State v. Redmond, 937 S.W.2d 205 (Mo.banc 1996);

State v. Battle, 32 S.W.3d 193 (Mo.App. E.D., 2000);

State v. Creighton, 52 S.W.2d 555 (Mo. 1932);

State v. Fouts, 939 S.W.2d 506 (Mo.App. S.D., 1997);

U.S. Const., Amends V, VI and XIV;

Mo. Const., Art. I, Secs. 10 and 18(a);

Sections 565.002, 565.021, 565.023, and 565.025; and

MAI-CR3d 313.08.

II.

The trial court erred in refusing to instruct the jury on self-defense (Refused Instruction A), because there was substantial evidence putting that defense in issue and thus the trial court's refusal violated Ms. Avery's rights to due process of law, to present a defense, and to a fair trial, as guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the jury could have found that: (1) Ms. Avery was not the initial aggressor; (2) she had a reasonable belief that deadly force was necessary to protect herself against an immediate danger of death, serious physical injury, rape, sodomy, or serious physical injury through burglary; (3) she had a reasonable cause for that belief because Paris refused to leave her residence after having been earlier forced to leave at gun point, he threatened bodily harm to her, and he rushed at her and grabbed her gun; and (4) Ms. Avery did all within her power, consistent with her personal safety, to avoid the danger and the need to take a life in that she attempted to reason with Paris and begged him to leave her house before being forced to shoot him when he came at her.

State v. Weems, 840 S.W.2d 222 (Mo.banc 1992);

In the Interest of J. M., 812 S.W.2d 925 (Mo.App. S.D., 1991);

State v. Wright, 352 Mo. 66, 175 S.W.2d 866 (Mo.banc 1943);

State v. Eldridge, 554 S.W.2d 422 (Mo.App. St.L.D., 1977);

U.S. Const., Amends. V, VI, and XIV;

Mo. Const., Art. I, Sections 10 and 18(a);

Sections 563.031; and

MAI-CR3d 304.11, 306.06.

III.

The trial court erred in refusing to instruct the jury on defense of premises (Refused Instruction B), because there was substantial evidence that: (1) Ms. Avery reasonably believed it necessary to prevent Paris' attempted burglary of her residence; (2) his entry was made or attempted in a violent and tumultuous manner; and (3) Ms. Avery reasonably believed that his entry was made for the purpose of assaulting or offering physical violence to her and she reasonably believed that force was necessary to prevent the commission of a felony, and therefore the trial court's refusal violated Ms. Avery's rights to due process of law, to present a defense, and to a fair trial, as guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Paris had been earlier forced to leave Ms. Avery's residence at gun point, he refused to leave her residence and threatened to beat her after she requested him to leave at gun point, and he rushed at her and grabbed her gun.

State v. Ivicsics, 604 S.W.2d 773 (Mo.App. E.D., 1980);

State v. Johnson, 54 S.W.3d 598 (Mo.App. W.D., 2001);

State v. Dulaney, 989 S.W.2d 648 (Mo.App. W.D., 1999);

State v. Westfall, 75 S.W.3d 278 (Mo.banc 2002);

U.S. Const., Amends. V, VI, and XIV;

Mo. Const., Art. I, Sections 10 and 18(a);
Sections 563.036, 569.160; and
MAI-CR3d 306.10.

IV.

The trial court abused its discretion in overruling Ms. Avery’s motion to remove juror Savas and replace her with an alternate, because this denied Ms. Avery her rights to due process and to be tried by a full panel of impartial jurors, as guaranteed by the 5th, 6th, and 14th Amendments to the U.S. Constitution and Art. I, Sections 10, 18(a), and 22(a) of the Missouri Constitution, in that on the fourth day of trial Savas, who was a “little bit overwhelmed,” informed the court, with her voice shaking, that she worked in the same courthouse as State’s witness Adams and that courthouse staff members were threatened by a man who wanted to marry Ms. Avery while she was incarcerated there, thus Savas’ presence on the jury may have influenced the verdict; jurors had been asked if they knew of Ms. Adams and Ms. Avery, yet Savas did not respond, so Ms. Avery was unable to use a peremptory strike to remove her; and there were two alternate jurors available, yet the trial court discharged them from the jury instead of removing Savas, resulting in an abuse of discretion.

State v. Coy, 550 S.W.2d 940 (Mo.App. W.D., 1988);

Williams v. Barnes Hospital, 736 S.W.2d 33 (Mo.banc 1987);

Seaton v. Toma, 988 S.W.2d 560 (Mo.App. S.D., 1999);

State v. Coleman, 725 S.W.2d 113 (Mo.App. E.D., 1987);

U.S. Const. Amends. V, VI, and XIV;

Mo. Const. Art. I, Sections 10, 18(a), and 22(a).

V.

The trial court abused its discretion when it forced Ms. Avery to present one of her exhibits (Exhibit F - her videotaped statement) simultaneously with the State presenting one of its exhibits (Exhibit P-94 - the transcript of the videotape) to the jury, because this deprived Ms. Avery of her fundamental rights to due process, a fair trial, and to present a defense, as guaranteed by the 5th, 6th, and 14th Amendments to the United States Constitution, and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Ms. Avery offered to allow the State to present the transcript to the jury after she played the videotape; Ms. Avery was entitled to have the jury view her exhibit without the distraction of the State's exhibit so that the evidence could be fairly and fully be considered by the jury; and the State's request to have the jury read the transcript at the same time that Ms. Avery played the videotape was designed solely to distract jurors, as evidenced by the fact that the State had its witness Knowles testify about the contents of the videotape rather than showing it to the jury, and, then the State attempted over the course of two days to prevent Ms. Avery from playing the videotape even though it was the best evidence of her statement and Ms. Avery was entitled to show it under the rule of completeness.

State v. Williams, 948 S.W.2d 429 (Mo.App. E.D., 1997);

United States v. McMillan, 508 F.2d 101 (8th Cir. 1974);

State v. Crimi, 655 N.E.2d 230 (Ohio App.3d 1995);

State v. Collier, 892 S.W.2d 686 (Mo.App. W.D., 1994);

U.S. Const., Amend. V, VI, and XIV; and,

Mo. Const. Art. I, Sections 10 and 18(a).

ARGUMENT

I.

The trial court erred in refusing to instruct the jury on voluntary manslaughter, Refused Instruction C, because the evidence injected the issue of “sudden passion arising from adequate cause” and gave the jury a basis to acquit Ms. Avery of second degree murder and find her guilty of voluntary manslaughter and therefore the trial court’s ruling deprived Ms. Avery of her rights to due process and a fair trial, as guaranteed by the 5th, 6th, and 14th Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that Paris had been harassing Ms. Avery; prior to the shooting she had to force him to leave her secluded residence at gun point; he returned uninvited in the dead of the night to her residence, entered it, and threatened to beat her; and, he then rushed at her and grabbed her gun in an attempt to wrestle it away from her. This evidence was sufficient “to ignite a sudden passion in any reasonable person,” justifying a voluntary manslaughter instruction.

Ms. Avery was charged with first degree murder and armed criminal action (L.F. 6). At trial, she submitted Refused Instruction C, a voluntary manslaughter instruction patterned after MAI-CR3d 313.08 (Tr. 1118; L.F. 131; Appendix A-5). The trial court refused that instruction on the basis that “there is no evidence in the record that would constitute the elements of heat of passion to correspond with a

voluntary manslaughter instruction” (Tr. 1118). Ms. Avery objected to the trial court’s failure to give the refused instruction, contending that there was evidence to support the instruction (Tr. 1128-1129). Ultimately, the jury found Ms. Avery guilty of the lesser included offense of murder in the second degree and the related armed criminal action (Tr. 1194; L.F. 134-135). In Ms. Avery’s motion for new trial she contended that the trial court erred in not giving an instruction on voluntary manslaughter because there was evidence that the shooting was done under the influence of sudden passion arising from adequate cause, violating her rights to due process and a fair trial as guaranteed under the 5th, 6th and 14th Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution (L.F. 147; claim 25). Thus, this issue is properly preserved for appeal.

The following evidence, viewed in the light most favorable to the giving of a voluntary manslaughter instruction, were adduced at trial.

Paris, who was much bigger than Ms. Avery, had been making harassing phone calls to her and during the last phone call she told him to stop calling or she would notify the police (Tr. 544-545, 583, 1009-1011). On the night in question, Paris, who had been drinking and smoking marijuana, grabbed Ms. Avery’s breast (Tr. 377, 410-412, 709-711, 723-724, 906, 1029-1031). Then, less than an hour prior to the shooting, he refused to leave her residence, so she had to use a gun and threaten to call the police to get him to leave (Tr. 542, 1041-1042). When he left,

he “flipped her off” and uttered some profanities (Tr. 542, 1041-1044).¹²

Undaunted, he came lurking back to Ms. Avery’s isolated residence in the dead of night (Tr. 438, 543, 1047-1050). Ms. Avery, who was afraid of the dark because she had been gang-raped, was carrying a gun (Tr. 438, 441-442, 535-536, 788-789, 1045-1046). He entered her residence, uninvited (Tr. 438, 543, 1050). She pointed a gun at him and ordered him to move, but he refused (Tr. 438, 525, 543, 1051, 1085). He was mad and threatened, “Put the f---ing gun down or else I’ll beat your f---ing ass.” (Tr. 438, 525, 543, 1051, 1085). She did not drop the gun because she was “scared to death” (Tr. 1085). He rushed at her (Tr. 438, 525, 1051). She believed that he was going to hurt her, so she backed away (Tr. 438, 515, 516, 525, 530, 535, 543, 825, 836, 1051, 1086). He grabbed the gun, and as they wrestled over it, she pulled the trigger, firing one shot (Tr. 438, 515, 516, 525, 530, 535, 543, 825, 836, 1051, 1086). She immediately called her boyfriend and told him that she had been afraid that Paris was going to hurt her and so she shot him (Tr. 786, 807, 808). She was hysterical, and said something like, “I was scared. There was a struggle;” she also said, “He came at me and I shot him” (Tr.

¹² A former girlfriend of Paris testified that after she separated from Paris, he would visit her and would refuse to leave (Tr. 989, 991). The trial court refused on offer of proof from another former girlfriend, who was a state’s witness, who also would have testified that once Paris picked her up, grabbed her hair, and threw her down the stairs out of her trailer (Tr. 655).

786, 807, 808). When the deceased's body was examined, a hair from Ms. Avery, which still had the root on it, was found in his hand (Tr. 454-455, 463, 470, 472, 905, 938-942, 948-955, 956).

The Southern District held that the foregoing evidence was “insufficient to ignite a sudden passion in any reasonable person” (Mem. Op. at 11). This holding is contrary to previous decisions of the appellate courts of this state and involves a question of general interest or importance.

A defendant is entitled to an instruction on any theory that the evidence and the reasonable inferences therefrom tend to establish. *State v. Westfall*, 75 S.W.3d 278, 280 (Mo.banc 2002). The failure of the trial court to instruct on all lesser included offenses supported by the evidence is error. *State v. Derenzy*, 89 S.W.3d 472 (Mo.banc 2002). A defendant has a due process right to lesser-included offense instructions if they are warranted by the evidence. *Mercer v. State*, 666 S.W.2d 942, 945 (Mo.App. S.D., 1984).

“A trial court is required to instruct on a lesser included offense if the evidence, in fact or by inference, provides a basis for both an acquittal of the greater offense and a conviction on the lesser offense, and if such instruction is requested by one of the parties or the court.” *State v. Redmond*, 937 S.W.2d 205, 208 (Mo.banc 1996). “Doubt as to whether to instruct on the included offense is to be resolved in favor of instructing on the included offense.” *State v. Yacub*, 976 S.W.2d 452, 453 (Mo.banc 1998). In a case involving the failure to give a lesser included offense instruction, this Court must consider the evidence in the

light most favorable to the Appellant. *State v. Weems*, 840 S.W.2d 222, 226 (Mo.banc 1992); *State v. Edwards*, 980 S.W.2d 75, 76 (Mo.App. E.D., 1998). If the evidence tends to establish the defendant's theory, or supports differing conclusions, the defendant is entitled to an instruction on it. *Westfall*, 75 S.W.3d at 280. Jurors may accept part of a witness' testimony while disbelieving other portions. *State v. Robinson*, 26 S.W.3d 414, 417 (Mo.App. E.D. 2000). Jurors may also draw certain inferences from a witness's testimony, but reject others. *Redmond*, 937 S.W.2d at 209.

Voluntary manslaughter is a lesser included offense of second degree murder. *Redmond*, *supra*; see also **Section 565.025.2(2)(a)**. To be guilty of murder in the second degree, Ms. Avery had to cause the death of Paris, with the purpose of causing serious physical injury to him (L.F. 116, 134). *Id*; **Section 565.021.1(1)**. Whereas, "voluntary manslaughter is defined as causing the death of another person under circumstances that would constitute murder in the second degree, except that the death was caused 'under the influence of sudden passion arising from adequate cause.'" *Redmond*, 937 S.W.2d at 208, *quoting* **Section 565.023.1(1)**. Accordingly, the trial court was required to instruct on voluntary manslaughter if there was sufficient evidence to support a finding that Ms. Avery caused the death of Paris under the influence of sudden passion arising from adequate cause. *Id*.

"'Sudden passion' is defined as 'passion directly caused by and arising out of provocation by the victim . . . which passion arises at the time of the offense

and is not solely the result of former provocation. ” *Id.*, quoting **Section 565.002(7)**. Passion may be rage or anger, or terror that is so extreme that the actor is momentarily being directed by passion. *State v. Fears*, 803 S.W.2d 605, 609 (Mo.banc 1991). There is no requirement that the actor acted reasonably to get a voluntary manslaughter instruction. *Redmond*, 937 S.W.2d at 209.

“‘Adequate cause’ is cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person’s capacity for self-control.” *Redmond*, 937 S.W.2d at 208 (quoting **Section 565.002(1)**). The provocation must be of a nature calculated to inflame the passions of an ordinary, reasonable, temperate person and must result from a sudden, unexpected encounter or provocation tending to excite the passion beyond control. *Fears*, 803 S.W.2d at 609. Words alone, no matter how opprobrious or insulting, are not sufficient to show adequate provocation. *Id.* At a minimum the provocation must at least involve a “pulling” or “tweaking” of the nose. *Id.* But there is no requirement that there be physical violence to Ms. Avery’s person to support adequate provocation. *State v. Newlon*, 721 S.W.2d 89, 92 (Mo.App. E.D., 1986).

Here, there was sufficient evidence of Ms. Avery’s terror or fear of the deceased to support a finding a sudden passion. Evidence that she was scared or afraid of the deceased at the time she shot him is sufficient evidence of “passion” since that term includes terror. *Fears*, 803 S.W.2d at 609; *Redmond*, 937 S.W.2d

at 208-209. And, that fear or terror was directly caused by and arising out of provocation by Paris and arose at the time of the offense. **Section 565.002(7).**

For instance, Ms. Avery said that she did not drop the gun after Paris threatened to beat her because she was “scared to death” (Tr. 1085). Immediately after she shot him, she called her boyfriend screaming that she believed that Paris was going to hurt her (Tr. 786, 807, 808). She was hysterical, and said something like, “I was scared. There was a struggle” (Tr. 786, 807). She also said that she had been afraid of him (Tr. 788). Certainly this evidence is sufficient to support a finding that she was acting under terror or fear that was so extreme that she was momentarily being directed by passion. *Fears, supra; Redmond, supra.*

The evidence also supported a finding of “adequate cause” in that the Paris’ actions and threats would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person’s capacity for self-control. *Redmond*, 937 S.W.2d at 208.

For instance, just earlier that night, Ms. Avery had to use a gun to get Paris to leave her residence (Tr. 542, 1042-1044). Undaunted, he came lurking back to her isolated residence in the dead of night (Tr. 438, 543, 906, 1047-1050). Even when she again pointed the gun at him and ordered him to move, he did not (Tr. 543). Instead, he was mad, and said, “Put the f---ing gun down or else I’ll beat your f---ing ass.” (Tr. 438, 525, 543, 1051, 1085). She did not drop the gun because she was “scared to death” (Tr. 1085). He rushed at her (Tr. 438, 525, 1051). She backed away, he grabbed the gun, and as they wrestled over it, she

shot him because she believed that Paris was going to hurt her (Tr. 438, 515, 516, 525, 530, 535, 543, 786, 807-808, 825, 836, 1051, 1086).

This evidence supports a finding of adequate cause. Although Paris did not have a weapon, he threatened to “beat [her] f---ing ass,” rushed at her, and attempted to take the gun away from her. Thus, while he did not have a weapon, he would have one after he took the gun away from her. Ms. Avery was not obliged to wait in order to ascertain whether he would accomplish the violence actually threatened. A person about to be attacked may properly use force to prevent the attack, and is not bound to wait until his adversary strikes a blow. *In the Interest of J. M.*, 812 S.W.2d 925, 933 (Mo.App. S.D., 1991). *See, State v. Bidstrup*, 237 Mo. 273, 140 S.W. 904, 908 (1911) (“The fact that when [the victim] was advancing upon the defendant he said nothing but continued to advance, even after the first shot was fired and he was warned not to come nearer, strongly indicates that he was bent upon doing the defendant bodily injury.” *Id.*).

In *Redmond*, there was evidence from which the jury could have found that Redmond and the victim had a heated argument, during which the victim threatened Redmond with a weapon. *Id.* at 209. The victim approached Redmond in a threatening manner and an altercation ensued “because the victim accused Redmond of mistreating the mother of Redmond’s alleged child.” *Id.* The victim displayed the handle of a gun, thus causing Redmond to fear for his life. *Id.* Redmond hit the victim with a baseball bat. *Id.* This Court found that this was sufficient evidence to instruct the jury on voluntary manslaughter because the

threatening confrontation along with the showing of a gun is the type of provocation that could cause a reasonable person to lose self-control. *Id.* The trial court's failure to so instruct the jury required reversal for a new trial. *Id.*

Similarly here, Paris, who was on drugs on alcohol, and Ms. Avery were in a heated argument, during which he threatened to "beat [Ms. Avery's] f--king ass"; Paris approached Ms. Avery in a threatening manner; and, Ms. Avery feared for her life. Again, "sudden passion" may be based on terror; it need not be rage or anger. *Fears*, 803 S.W.2d at 609.

In *State v. Battle*, 32 S.W.3d 193 (Mo.App. E.D., 2000), the defendant was convicted of second degree murder and armed criminal action. The Eastern District Court of Appeals reversed for a new trial when it found that the trial court erred in failing to instruct the jury on the lesser included offense of voluntary manslaughter. *Id.* at 196-98. The appellate court found the following facts provided a basis for the jury to have convicted the defendant of voluntary manslaughter:

In the hours preceding the shooting, victim continuously glared at defendant and his girlfriend; nudged defendant several times so as to spill his drink; tried to run defendant's car off the road; followed defendant to his residence at speeds of up to 100 miles per hour; physically struck defendant's girlfriend on multiple occasions; and made numerous threatening remarks to defendant and his girlfriend, such as "I'll kill you" and "This ain't over." Victim also lunged for defendant's gun, causing it to

discharge. Victim then leaned toward the passenger seat in the direction of the glove compartment. Defendant did not know that the first shot struck victim and, in any event, there is no evidence that the first shot rendered victim unconscious and incapable of reaching for or using a weapon on defendant or his girlfriend. All these events were close in time, particularly those occurring at defendant's residence, and could have caused a reasonable person to lose control and act out of passion rather than reason.

Id. at 197.

Similarly, here, Paris made had previously harassed Ms. Avery; he made threatening remarks to her right before the shot was fired, threatening bodily harm to her; and he lunged for her gun, right before it discharged.

In *Fears*, the defendant and victim had a heated quarrel, where the victim poked the defendant several times with his finger, and swung at the defendant with his fist. The defendant blocked the swing and punched the victim causing him to fall to the ground. The victim died by a resulting head injury. This Court held this evidence was sufficient to inject the issue of sudden passion so as to warrant a voluntary manslaughter instruction. This Court found that a physical altercation in which the victim swung his fist at the defendant constituted adequate provocation:

The aggregate of the insulting words, offensive gestures and physical contacts that occurred during this encounter was . . . sufficient to put Fears in fear of serious bodily harm, carried out in a time span insufficient for reasonable persons to have found that Fears acted under "sudden passion."

803 S.W.2d at 609.

Similarly here, Ms. Avery and Paris had a heated quarrel; and he threatened Ms. Avery and made physical contact, causing her to shot him because she feared for her life.

In *State v. Fouts*, 939 S.W.2d 506, 511 (Mo.App. S.D., 1997), there was evidence that the defendant and victim engaged in a heated argument at the time defendant inflicted the fatal injury upon her. Defendant testified that the victim approached him with a knife and threatened to stab him with it, and when she came toward him, he kicked her and she fell to the floor. *Id.* at 509, 511. Other witnesses testified that defendant made various inconsistent out-of-court statements whereby he related that the injury he inflicted on the victim was in the heat of the altercation. *Id.* at 511. The court of appeals found that the trial court committed reversible error in refusing to give an instruction on voluntary manslaughter. *Id.*

Similarly, here there was evidence that Ms. Avery and Paris engaged in a heated argument at the time Ms. Avery inflicted the fatal injury upon him, and witnesses testified that Ms. Avery made out-of-court statements whereby she related that the injury she inflicted on Paris was in the heat of the altercation.

In *State v. Patterson*, 484 S.W.2d 278 (Mo. 1972), the defendant and the deceased began arguing at a party. The defendant went to get a pistol from his wife's purse after being informed that the deceased carried a knife. He returned, and when the deceased pulled a knife the defendant fired three times, twice as the

deceased fled. The defendant stated that he shot because he would not let anyone kill him. This Court held that it could not declare as a matter of law that the killing was not the result of a “sudden unexpected assault, encounter, or provocation tending to excite the passion beyond control,” and that the failure to instruct on manslaughter was error. *Id.* at 280. The facts in Ms. Avery’s case are more compelling than *Patterson’s* regarding a finding of sudden passion arising out of adequate cause.

Finally, in *State v. Creighton*, *supra*, the prosecution introduced defendant’s written confession in which he declared that he shot the deceased because “he was angered because of the deceased’s conduct – brushing against him, taking hold of his coat, and asking him if he was looking for trouble.” *Creighton*, 52 S.W.2d at 560-561. At trial, the defendant testified that he killed in self-defense and denied that he was acting under heat of passion. *Id.* at 559-561. On appeal, the State urged that the defendant’s trial testimony precluded a manslaughter instruction, though the defendant did testify the deceased committed a battery on him. *Id.* at 561. This Court disagreed, finding that a manslaughter instruction should have been given, and reversed for a new trial. *Id.* at 561-562:

If there is substantial evidence of lawful provocation, the defendant is entitled to an instruction on manslaughter. Proof of an initial assault and battery upon him by the deceased is such evidence because it measures up to the standard exacted by the law and in point of fact warrants an inference that heat of passion was engendered thereby. That inference (not

presumption) being introduced into the case, how can any amount of evidence to the contrary take it out, though, perhaps, clearly outweighing it?

Id. at 562. Neither the trial court nor this Court can pass on the weight of the evidence in a criminal case; that function belongs to the jury. *Id.*

In *Creighton*, a manslaughter instruction was supported by the deceased brushing against the defendant, taking hold of his coat, and asking him if he was looking for trouble. In Ms. Avery's case, the evidence supporting a manslaughter instruction was more compelling: Paris threatened to beat Ms. Avery just prior to his rushing at Ms. Avery and grabbing her gun.

The jury should have been given the opportunity to consider voluntary manslaughter. As a result, Ms. Avery's murder conviction must be reversed, and she is entitled to a new trial before a properly instructed jury. Furthermore, since armed criminal action requires the commission of an underlying felony, Ms. Avery's conviction for that offense must also be reversed and remanded for a new trial. *Redmond*, 937 S.W.2d at 210.

II.

The trial court erred in refusing to instruct the jury on self-defense (Refused Instruction A), because there was substantial evidence putting that defense in issue and thus the trial court's refusal violated Ms. Avery's rights to due process of law, to present a defense, and to a fair trial, as guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the jury could have found that: (1) Ms. Avery was not the initial aggressor; (2) she had a reasonable belief that deadly force was necessary to protect herself against an immediate danger of death, serious physical injury, rape, sodomy, or serious physical injury through burglary; (3) she had a reasonable cause for that belief because Paris refused to leave her residence after having been earlier forced to leave at gun point, he threatened bodily harm to her, and he rushed at her and grabbed her gun; and (4) Ms. Avery did all within her power, consistent with her personal safety, to avoid the danger and the need to take a life in that she attempted to reason with Paris and begged him to leave her house before being forced to shoot him when he came at her.

Ms. Avery submitted refused Instruction A, which was a self-defense instruction patterned after **MAI-CR3d 306.06** (Tr. 1117; L.F. 127-128; Appendix A-1 to A-2). The trial court refused to give this proposed instruction (Tr. 1117-1118). Ms. Avery objected to the trial court's refusal to give the proposed

instruction and contended that there was evidence to support it (Tr. 1128-1129).¹³ The issue was raised in Ms. Avery's timely motion for new trial, so it is properly preserved for appeal (L.F. 146; claim 23).

A defendant is entitled to an instruction on any theory that the evidence and the reasonable inferences therefrom tend to establish. *State v. Westfall*, 75 S.W.3d 278, 280 (Mo.banc 2002). For instance, the court is required to instruct on self-defense if there is any substantial evidence putting that defense in issue. *State v. Weems*, 840 S.W.2d 222, 226 (Mo.banc 1992). When such evidence exists, a self-defense instruction is to be given whether requested or not. *State v. Weddle*, 88 S.W.3d 135, 138 (Mo.App. S.D., 2002). Whether the evidence requires the giving of a self-defense instruction is a question of law. *State v. Huffman*, 711 S.W.2d 192, 193 (Mo.App. E.D., 1986). "Failure to submit such an instruction constitutes reversible error." *Weems*, 840 S.W.2d at 226.

The quantum of proof necessary to require the giving of a self-defense instruction has been variously defined as "substantial evidence;" "evidence putting it in issue;" "any theory of innocence * * * however improbable that theory may seem, so long as the most favorable construction of the evidence supports it;" "supported by evidence;" "any theory of the case which his evidence tended to

¹³ "Even if no objection is made, the failure to instruct upon a defense supported by the evidence is plain error affecting substantial rights." *State v. Westfall*, 75 S.W.3d 278, 281 (Mo.banc 2002).

establish;” “established defense;” and “evidence to support the theory.” *Weems*, 840 S.W.2d at 226, *quoting*, *State v. McQueen*, 431 S.W.2d 445, 448-449 (Mo. 1968) (citations omitted).

In determining whether there was substantial evidence, this Court must consider the evidence in the light most favorable to the defendant. *Weems*, 840 S.W.2d at 226. If the evidence tends to establish the defendant’s theory, or supports differing conclusions, the defendant is entitled to an instruction on it. *Westfall*, 75 S.W.3d at 280. Any conflict in the evidence is to be resolved by a jury properly instructed on self-defense. *State v. Zumwalt*, 973 S.W.2d 504, 507 (Mo.App. S.D. 1998).

Substantial evidence of self-defense requiring instruction may come from the defendant’s testimony alone. *Westfall*, 75 S.W.3d at 280. “Moreover, an instruction on self-defense must be given when substantial evidence is adduced to support it, even when that evidence is inconsistent with the defendant’s testimony.” *Id.* at 280-281. Jurors may accept part of a witness’ testimony while disbelieving other portions. *State v. Redmond*, 937 S.W.2d 205, 209 (Mo.banc 1996). Jurors may also draw certain inferences from a witness’s testimony, but reject others. *Id.* Jury instruction as to all potential defenses is so essential to ensure a fair trial that if a reasonable juror could draw inferences from the evidence presented, the defendant is not required to put on affirmative evidence to support a given instruction. *Westfall*, 75 S.W.3d at 281 (*citing*, *State v. Santillan*, 948 S.W.2d 574, 576 (Mo.banc 1997)).

Self-defense is a person's right to defend herself against attack. *State v. Chambers*, 671 S.W.2d 781, 783 (Mo.banc 1984). That right is codified in **Section 563.031**. Under that section, a person may use physical force upon another person when and to the extent she reasonably believes such force to be necessary to defend herself from what she reasonably believes to be the use or imminent use of unlawful force by such other person, unless the defender was the initial aggressor. **Section 563.031.1**.

However, a person may not use deadly force unless she reasonably believes that such deadly force is necessary to protect herself against death, serious physical injury, rape, sodomy, or kidnapping, or serious physical injury through robbery, burglary or arson. **Section 563.031.2**.

Generally, four elements must be present to permit the use of deadly force in self-defense: (1) an absence of aggression or provocation on the part of the defender, (2) a reasonable belief that deadly force is necessary to protect herself against an immediate danger of death, serious physical injury, rape, sodomy, kidnapping, or serious physical injury through robbery, burglary, or arson; (3) a reasonable cause for that belief; and (4) an attempt by the defender to do all within her power consistent with her own personal safety to avoid the danger and the need to take a life. *Weems*, 840 S.W.2d at 226; *Chambers*, 671 S.W.2d at 783. The reasonableness of a defendant's belief in the necessity of using deadly force is generally a question of fact for the jury to determine. *State v. Peek*, 806 S.W.2d 504, 506 (Mo.App. E.D., 1991); *Chambers*, 671 S.W.2d at 783. In resisting an

assault, a person is not required to determine with absolute certainty the amount of force required for that purpose. *Id.*

Based upon the substantial evidence in this case, the trial court erred in not submitting a self-defense instruction. The evidence in the light most favorable to the giving of the self-defense instruction, *Weems*, 840 S.W.2d at 226, follows.

Ms. Avery had received numerous harassing phone calls from Paris (Tr. 544-45, 583, 1009-10). During the last call, Ms. Avery told him to leave her alone and said that if he ever called again, then she would call the police (Tr. 1011). On the night in question, Paris was drinking alcohol, smoking marijuana, and had grabbed Ms. Avery's breasts (Tr. 377, 410-12, 709-11, 723-24, 906, 1029-31). Ms. Avery had to threaten to call the police and to exhibit a handgun in order to force Paris to leave her residence (Tr. 542, 1042-44). He "flipped her off" before leaving (Tr. 1044). Sometime after he left, while she was outside, she heard a "rustling like walking" and saw a "figure" walking towards her; she was scared, so she stepped inside the house (Tr. 438, 543, 1047-50). She heard someone walking up the steps, so she pointed the gun at the door (Tr. 438, 543, 1050). It was Paris (Tr. 438, 543). She told him to move (Tr. 543). He looked mad, and said, "Put the f---ing gun down or else I'll beat your f---ing ass." (Tr. 438, 525, 543, 1051, 1085). She did not drop the gun because she was "scared to death" (Tr. 1085). He came at her, she backed away, he grabbed the gun, they wrestled over it, and she pulled the trigger, firing one shot (Tr. 438, 515, 516, 525, 530, 535, 543, 825, 836, 1051, 1086). Immediately after she shot him, she called her boyfriend and

screamed that she had shot Paris because she believed that he was going to hurt her (Tr. 786, 807, 808). She was hysterical, and said something like, “I was scared. There was a struggle” (Tr. 786, 807). She also said, “He came at me and I shot him,” and she mentioned that Paris threatened to hurt her (Tr. 786, 807). She had been afraid of Paris (Tr. 788).

When Paris’ body was examined, one of Ms. Avery’s hairs, which still had the root on it, was found in Paris’ hand (Tr. 454-55, 463, 470, 472, 905, 955). The single gunshot that had killed Paris appeared to be caused from a very close shooting, not in contact, but a near contact discharge or within a couple of inches (Tr. 972-74, 981). According to an investigator for the Missouri Highway Patrol, the blood spatter was consistent with the statements Ms. Avery had given to the law enforcement officers (Tr. 499-500, 502, 527).

Therefore, viewing the evidence most favorable to Ms. Avery: (1) Paris was the initial aggressor; (2) there was a real or apparently real necessity for Ms. Avery to kill in order to protect herself against death, serious physical injury, rape, sodomy, or burglary; (3) there was a reasonable cause for Ms. Avery’s belief in such necessity because Paris refused to leave, after having been earlier forced to leave at gun point, he threatened bodily harm to Ms. Avery, and he rushed at her and grabbed her gun; and (4) Ms. Avery did all within her power, consistent with her personal safety, to avoid the danger and the need to take a life in that she attempted to reason with Paris and begged him to leave the house. Thus, all

elements of the *Chambers* test were met, and a self-defense instruction was required to be given.

Although Paris did not have a weapon, he was bigger than Ms. Avery, he had threatened to beat her, and he was attempting to wrestle the gun away from her when she shot him. “[A]n individual who is where [she] has a right to be and reasonably believes [she] is in imminent danger of assault by another has the right of attack when it reasonably appears necessary for protection against the impending assault.” *In the Interest of J. M.*, 812 S.W.2d 925, 933 (Mo.App. S.D., 1991). A person about to be attacked may properly use force to prevent the attack, and is not bound to wait until his adversary strikes a blow. *Id.* Ms. Avery was not obliged to wait until the nature and object of Paris’ attack was fully developed, nor to ascertain whether he was capable of accomplishing the violence actually threatened and that she reasonably believed was about to fall upon her. *State v. Bidstrup*, 237 Mo. 273, 140 S.W. 904, 908 (1911) (“The fact that when [the victim] was advancing upon the defendant he said nothing but continued to advance, even after the first shot was fired and he was warned not to come nearer, strongly indicates that he was bent upon doing the defendant bodily injury.” *Id.*).

Here, the trial court refused to give this proposed instruction, stating that the basis of its refusal was, “the defendant’s testimony on the stand when asked if it was self-defense or accident the defendant stated that it was accident” (Tr. 1117-

1118).¹⁴ The trial court's ruling is erroneous and is contrary to the law in Missouri.

Generally the defenses of accident and self-defense are inconsistent. *State v. Randolph*, 496 S.W.2d 257 (Mo.banc 1973). But a defendant may be entitled to have both submitted to the jury if supported by the evidence. *Id.* (State offered defendant's confession contained elements of both self-defense and accident, so instruction on inconsistent defenses was justified). *Also see, State v. Wright*, 352 Mo. 66, 175 S.W.2d 866 (Mo.banc 1943) (pretrial statements made by defendant, furnished substantial basis for self-defense instruction, so defendant was entitled to self-defense instruction although at the trial he denied having made such statement); *State v. Eldridge*, 554 S.W.2d 422, 425 (Mo.App. St.L.D., 1977)

¹⁴ During Ms. Avery's cross-examination, the following occurred:

Q. When you shot Bruce Paris did you shoot him because the gun went off accidentally or did you shoot him in self defense?

A. I think the gun went off accidentally. I believe the gun went off accidentally.

Q. So it was an accident?

A. (Witness nodded head).

Q. So you had no intention to see Bruce Paris dead?

A. No.

(Tr. 1084).

(defendant is entitled to instructions on defenses of accident and self-defense if evidence supporting each is supplied by the State).

Although a defendant's trial testimony alone cannot provide the basis for inconsistent defenses, *State v. Peal*, 463 S.W.2d 840, 842 (Mo.1971), the evidence necessary to justify instructions on these two defenses, however, may be offered by the State or proved by third party witnesses for the defendant. *Wright*, 175 S.W.2d at 866.¹⁵ For example, if a defendant by her own testimony provides the basis for an accident defense, she is still entitled to a self-defense instruction if the testimony of others supports such an instruction. *Eldridge*, 554 S.W.2d at 425; *Peal*, 463 S.W.2d at 842.

As early as 1911 the Missouri Supreme Court was presented with the following question: "[I]s the defendant in a criminal case entitled to an instruction submitting a defense inconsistent with his own testimony and arising upon facts and circumstances expressly denied by him?" *Bidstrup*, 140 S.W. at 907. This Court in *Bidstrup* answered that question in the affirmative and reversed for a new trial, holding that, whether requested or not, the trial court was required to give a self-defense instruction where such issue was raised by the State's evidence,

¹⁵ Although the older cases speak in terms of giving an instruction on accident, that instruction no longer exists. **MAI-CR3d 304.11** now views accident as a fact in negation of essential elements of the crimes of assault or homicide. *State v. Branch*, 757 S.W.2d 595, 599 (Mo.App. E.D., 1988).

though denied by and inconsistent with the evidence offered by the defendant himself. *Id.* at 907-909.

Likewise, here the issue of self-defense was raised by a combination of Ms. Avery's trial testimony, which the jury was free to believe or disbelieve parts of, and her out-of-court statements made after the shooting. Ms. Avery's trial testimony that she thought that the gun went off accidentally did not preclude the giving of a self-defense instruction. The trial court erred in ruling otherwise. A defendant's claim at trial that the gun fired accidentally during the struggle does not eliminate self-defense. *Wright, supra; Bidstrup, supra*. Where there is evidence of self-defense in addition to evidence of accident, the defendant has the right to submit both defenses to the jury. *See, People v. Bedoya*, 681 N.E.2d 19 (Ill.App. 1 Dist.,1997) (Defendant's claim that his gun fired accidentally during struggle with victim did not eliminate self-defense in prosecution for murder; although firing of gun could have been unintended act, defendant claimed that it happened during life and death struggle); *People v. Robinson* 516 N.E.2d 1292 (Ill.App. 1 Dist.,1987) (Failure to give self-defense instruction in murder prosecution was reversible error; defendant testified that he became threatened by victim's yelling at him and that as he grabbed for shotgun to defend himself and struggled over it with companion of victim who had produced the shotgun, shotgun fell and accidentally discharged, killing victim, and evidence was sufficient to support finding of self-defense); *State v. Miller*, 739 A.2d 1264 (Conn.App.,1999) (Defendant was entitled to requested self-defense instruction in

murder prosecution, based on evidence that victim was passenger in vehicle defendant was driving, that victim was upset at defendant, that victim brandished loaded gun, that victim threatened defendant while holding gun, that defendant and victim struggled over gun, and that shots were accidentally fired during struggle).

The Southern District affirmed the trial court's ruling and held, "Defendant never admitted that she intentionally shot Victim. She consistently asserted that she shot him because the gun accidentally discharged and that she did not want or mean to shoot him." (Mem. Op. at 13). That holding ignores the following evidence.

Immediately after Ms. Avery shot Paris while he was attacking her, she telephoned her boyfriend and screamed that she had shot the deceased because she believed that he was going to hurt her (Tr. 786, 807, 808). She was hysterical, and said "He came at me and I shot him" (Tr. 786, 807; emphasis added). Similarly, Sheriff Ray Tipton testified that Ms. Avery told him: "I backed up and he came at me and said put the f---ing gun down or else I'll beat your f---ing ass." He then grabbed the gun and I pulled away and I pulled the trigger." (Tr. 438; emphasis added). Also, George Knowles of the Missouri Highway Patrol testified that Ms. Avery told him that during the deceased's attack of her, "She backed away and fired one shot." (Tr. 543). This evidence, and the reasonable inferences drawn therefrom, supports a finding that Ms. Avery intentionally shot the deceased while defending herself. Contrary to the Southern District's opinion, evidence that Ms.

Avery told others “I shot him” (Tr. 786, 807), “I pulled away and I pulled the trigger” (Tr. 438), and “she backed away and fired one shot” (Tr. 543), is evidence that she intentionally shot the victim, or that such conclusion would be a reasonable inference that could be drawn from that evidence. It should have been for the jury to determine whether it was necessary for Ms. Avery to use deadly force and whether there was another means by which she could have protected her personal safety. *Chambers*, 671 S.W.2d at 783-784.

The trial court erred in refusing to instruct the jury on self-defense and thereby hold the State to its burden of proving beyond a reasonable doubt that Ms. Avery did not act in lawful self-defense. The trial court should have left it to the jury to decide this critical question. As a result, Ms. Avery’s murder conviction must be reversed and she is entitled to a new trial before a properly instructed jury. Furthermore, since armed criminal action requires the commission of an underlying felony, Ms. Avery’s conviction for that offense must also be reversed and remanded for a new trial. *State v. Weems*, 840 S.W.2d 222 (Mo.banc 1992).

III.

The trial court erred in refusing to instruct the jury on defense of premises (Refused Instruction B), because there was substantial evidence that: (1) Ms. Avery reasonably believed it necessary to prevent Paris' attempted burglary of her residence; (2) his entry was made or attempted in a violent and tumultuous manner; and (3) Ms. Avery reasonably believed that his entry was made for the purpose of assaulting or offering physical violence to her and she reasonably believed that force was necessary to prevent the commission of a felony, and therefore the trial court's refusal violated Ms. Avery's rights to due process of law, to present a defense, and to a fair trial, as guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Paris had been earlier forced to leave Ms. Avery's residence at gun point, he refused to leave her residence and threatened to beat her after she requested him to leave at gun point, and he rushed at her and grabbed her gun.

Ms. Avery submitted Refused Instruction B, which was a defense of premises instruction patterned after **MAI-CR3d 306.10** (Tr. 1118; L.F. 129-130; Appendix A-3 to A-4). The reason given by the trial court for refusing that instruction was, "there is no evidence in the record that would sustain a defense of

premises. And again, the defendant when she testified stated that it was an accident.” (Tr. 1118).¹⁶

Ms. Avery objected to the trial court not giving the refused instruction (Tr. 1128-1129). She contended that there was evidence to support the instruction (Tr. 1129). She also raised the issue in her timely motion for new trial (L.F. 146-147; claim 24). Therefore, this claim is properly preserved for appeal.

A defendant is entitled to an instruction on any theory that the evidence and the reasonable inference therefrom tends to establish. *State v. Westfall*, 75 S.W.3d 278, 280 (Mo.banc 2002). In determining whether there was substantial evidence, this Court must consider the evidence in the light most favorable to the defendant. *State v. Weems*, 840 S.W.2d 222, 226 (Mo.banc 1992).

If the evidence tends to establish the defendant’s theory, or supports differing conclusions, the defendant is entitled to an instruction on it. *Westfall*, 75 S.W.3d at 280. Jury instruction as to all potential defenses is so essential to ensure a fair trial that if a reasonable juror could draw inferences from the evidence

¹⁶ To avoid undue repetition, Ms. Avery incorporates by reference her argument to Point II wherein she noted that the mere fact that Ms. Avery testified that the shooting was an accident would not preclude a justification defense, if supported by other evidence. E.g., *State v. Randolph*, 496 S.W.2d 257 (Mo.banc 1973); *State v. Branch*, 757 S.W.2d 595, 599 (Mo.App. E.D., 1988); *State v. Wright*, 352 Mo. 66, 175 S.W.2d 866 (Mo.banc 1943).

presented the defendant is not required to put on affirmative evidence to support a given instruction. *Id.*, 75 S.W.3d at 281.

Both self-defense and defense of premises are justification defenses. *State v. Dulaney*, 989 S.W.2d 648, 650 (Mo.App. W.D., 1999). Defense of premises is essentially “accelerated self-defense” because it authorizes “protective acts to be taken earlier than they otherwise would be authorized, that is, at the time when and place where the intruder is seeking to cross the protective barrier of the house.” *Id.*, quoting *State v. Ivicsics*, 604 S.W.2d 773, 777 (Mo.App. E.D., 1980).

Defense of premises also exempts the occupant from the duty to retreat before using deadly force. *Ivicsics*, 604 S.W.2d at 777.

As a result of the aforementioned differences between self-defense and defense of premises, among others, even when a self-defense instruction is given, it still can be reversible error for the trial court to fail to give a defense of premises instruction, even when not requested by the defendant. *Ivicsics*, *supra*; *State v. Johnson*, 54 S.W.3d 598 (Mo.App. W.D., 2001). The defendant has the burden of injecting the issue of defense of premises. **Section 563.036.3.**

Section 563.036.1 provides that a person in possession or control of premises may use physical force upon another person when and to the extent that she reasonably believes necessary to prevent or terminate what she reasonably believes to be the commission or attempted commission of the crime of trespass by the other person. There can be no question that there was evidence to support that Ms. Avery used physical force upon Paris to prevent or terminate Paris

trespassing in her house, after he had been previously ordered to leave at gunpoint and was ordered by Ms. Avery to move since he was “uninvited” (Tr. 525, 542-543, 786, 807, 1041-1044, 1050-1051, 1086). The question then becomes whether she was entitled to use “deadly force” to prevent the trespass.

Section 563.036.2 provides that a person may use deadly force in defense of premises when: (1) otherwise authorized under Chapter 563 RSMo, e.g., self-defense, Section 563.031; or (2) when she reasonably believes it necessary to prevent what she reasonably believes to be an attempt by the trespasser to commit arson or burglary upon her dwelling; or, (3) the other person makes or attempts to make entry into the premises in a violent and tumultuous manner, surreptitiously or by stealth, and the person in possession or control of the premises reasonably believes that the entry is attempted or made for the purpose of assaulting or offering physical violence to any person or being in the premises, and she reasonably believes that force is necessary to prevent the commission of a felony.

Here, Ms. Avery reasonably believed it necessary to prevent an attempt by the trespasser, Paris, to commit burglary upon her dwelling. **Section 563.036.2(3)**. Burglary in the first degree is committed when a person knowingly enters unlawfully or knowingly remains unlawfully in an inhabitable structure for the purpose of committing a crime therein, while there is present in the structure another person who is not a participant in the crime. **Section 569.160**. Here, the evidence showed that after Paris was ordered to leave at gun point, he returned, in the dark, uninvited (Tr. 438, 543, 1047-50). When Ms. Avery heard the rustling of

a trespasser, she ran inside and pointed the gun at the door (Tr. 438, 543, 1050). When she saw it was Paris, she told him to move (Tr. 543). He looked mad, and said, “Put the f---ing gun down or else I’ll beat your f---ing ass.” (Tr. 438, 525, 543, 1051, 1085). When she did not drop the gun, he came at her, she backed away, he grabbed the gun, they wrestled over it, and she pulled the trigger, firing one shot (Tr. 438, 515, 516, 525, 530, 535, 543, 825, 836, 1051, 1086). When Paris’ body was examined, his zipper was down and Ms. Avery’s hair, including the root, was found in his hand (Tr. 455, 463, 470, 472, 905, 906, 938-942, 948-956). This was evidence that Paris attempted to enter or remain unlawfully in Ms. Avery’s residence for the purpose of assaulting her, i.e., burglary in the first degree. E.g., *State v. Word*, 829 S.W.2d 113 (Mo.App. E.D., 1992). Therefore, Ms. Avery was entitled to use deadly force to prevent the burglary.

Further, based on the aforementioned facts, there was evidence that Paris made or attempted to make entry into Ms. Avery’s residence in a violent and tumultuous manner, surreptitiously or by stealth, and that Ms. Avery reasonably believed that the entry was attempted or made for the purpose of assaulting or offering physical violence to her, and she reasonably believed that force is necessary to prevent the commission of a felony, e.g., burglary or assault. **Section 563.036.2(3)**. Again, Ms. Avery was entitled to use deadly force to defend her premises.

The trial court erred in not submitting the case to the jury with an instruction on the defense of premises. As a result, Ms. Avery’s murder

conviction must be reversed and she is entitled to a new trial before a properly instructed jury. Furthermore, since armed criminal action requires the commission of an underlying felony, Ms. Avery's conviction for that offense must also be reversed and remanded for a new trial. *State v. Weems*, 840 S.W.2d 222 (Mo. banc 1992).

IV.

The trial court abused its discretion in overruling Ms. Avery's motion to remove juror Savas and replace her with an alternate, because this denied Ms. Avery her rights to due process and to be tried by a full panel of impartial jurors, as guaranteed by the 5th, 6th, and 14th Amendments to the U.S. Constitution and Art. I, Sections 10, 18(a), and 22(a) of the Missouri Constitution, in that on the fourth day of trial Savas, who was a "little bit overwhelmed," informed the court, with her voice shaking, that she worked in the same courthouse as State's witness Adams and that courthouse staff members were threatened by a man who wanted to marry Ms. Avery while she was incarcerated there, thus Savas' presence on the jury may have influenced the verdict; jurors had been asked if they knew of Ms. Adams and Ms. Avery, yet Savas did not respond, so Ms. Avery was unable to use a peremptory strike to remove her; and there were two alternate jurors available, yet the trial court discharged them from the jury instead of removing Savas, resulting in an abuse of discretion.

A juror disclosed on the fourth day of trial that she worked in the same courthouse as a jailer who testified for the State concerning statements made by Ms. Avery while in jail (Tr. 868-869). Ms. Avery was incarcerated in that courthouse (Tr. 869). This same juror also disclosed late that a man, who was intending to marry Ms. Avery, threatened the personnel in the courthouse where

the juror works (Tr. 869-870). Thus, this point raises the following issue: Does the trial court's refusal to remove that juror based only upon her assertion that these experiences caused her no problems indicate the court's lack of careful consideration, entitling Ms. Avery to a new trial, especially since two alternate jurors were available to deliberate and the late disclosure did not allow Ms. Avery to use a peremptory strike to remove the juror?

During *voir dire*, the trial court asked the venire panel if any of them had heard from any source or had read from any source or had seen on television anything about this trial or about Jamie Avery (Tr. 129). There was no response (Tr. 129). Later, defense counsel asked the venire panel if anyone thought they knew Ms. Avery (Tr. 186-87). Again, there was no response (Tr. 187).

Also during *voir dire*, the State informed prospective jurors that Caryl Adams was a "jailer" who worked "here in Webster County" (Tr. 156-57). When the prospective jurors were asked if they knew Ms. Adams, there was no response, including no response from juror Tina Savas, who worked in the same building as Ms. Adams (Tr. 156-58).

Voir dire questioning also revealed the following regarding Ms. Savas: her first cousin had been murdered and no one had been arrested (Tr. 173); her father was a police officer in Marshfield and a prison guard, and her sister was employed in the Webster County Sheriff's Department (Tr. 132); and, she knew a friend of Ms. Avery's mother (Tr. 148, 150-51).

On the fourth day of trial, juror Savas informed the court that she needed to speak to the trial court (Tr. 868). Her voice was shaking a little bit and she was “a little bit overwhelmed” (Tr. 868). She worked in the same building as Ms. Adams (Tr. 868). She did not know Ms. Adams by name, just by sight (Tr. 868). However, she did not believe that would be a “problem” to her and that she could set that aside (Tr. 868-69).

Juror Savas next related that until a former inmate testified, she did not realize that Ms. Avery “had been incarcerated in our jail upstairs” (Tr. 869).¹⁷ Although Ms. Savas had not met Ms. Avery, she did recall “an occasion where a gentleman came in to get a marriage license to marry – to apply to be married to a young lady upstairs that (sic) was incarcerated” (Tr. 869). Ms. Savas was not there when the man came in, but she was told that after the clerk’s office refused the man’s request, he became upset and made some threats (Tr. 869-70). The members of the courthouse were informed of those threats (Tr. 870).

The circuit clerk confirmed that the man’s name was “Bunch,” he was wanting to marry Ms. Avery, and that he was upset and agitated because they

¹⁷ This situation might not have occurred if Juror Savas would have mentioned that she worked in the same building as the jail and knew some of the jailers by sight, when veniremembers were informed that two of the State’s witnesses were jailers who worked in the Webster County Jail, and were asked if any of them knew the two jailers (Tr. 156-157).

would not bring Ms. Avery “down” (Tr. 870). Ms. Savas told the trial court that she was “fine with it” and would “have no problem with it” (Tr. 871). The trial court then asked her, “knowing what you know and the experience that you’ve had can you set aside that knowledge and that experience and act as a juror in this case and make your decisions based solely on the evidence presented in this courtroom and solely upon the instructions of law which the Court will give you?” (Tr. 871). Juror Savas replied, “Yes. I don’t have a problem with it.” (Tr. 871). Juror Savas was not instructed to not discuss this matter with other jurors (Tr. 871).

Defense counsel requested that juror Savas be removed, especially in light of the allegations of the threats made (Tr. 872). He pointed out that there were two alternate jurors and therefore the trial court ought to exclude juror Savas (Tr. 872).¹⁸ The State took no position, though it noted that Savas had indicated that the matters would not affect her ability to be fair and impartial (Tr. 873).

The trial court denied Ms. Avery’s motion to remove juror Savas, finding, “I think she has rehabilitated herself in reference to being struck for cause. She says she can set all this aside and make her decision as a juror based solely on the evidence present in court and the instructions given by the Court” (Tr. 873).

This issue was presented in Ms. Avery’s motion for new trial; therefore, this issue is properly preserved for appeal.

¹⁸ When the jury went to deliberate, those two alternates were discharged by the trial court (Tr. 1184-85).

A defendant has a constitutional right to a fair and impartial jury composed of twelve qualified jurors. *State v. Endres*, 698 S.W.2d 591, 595 (Mo.App. E.D., 1985); *Morgan v. Illinois*, 504 U.S. 719, 726-29 (1992); **Mo. Const. art. I, sec. 22(a)**. This right mandates that potential jurors answer fully and truthfully all the questions posed to them during *voir dire*. *State v. Martin*, 755 S.W.2d 337, 339 (Mo.App. E.D. 1988).

Further, a defendant is entitled to a full panel of qualified jurors before she makes her peremptory strikes. *Coleman*, 725 S.W.2d at 114. To this end, it is the duty of a juror on *voir dire* examination to fully, fairly and truthfully answer all questions directed to the panel so that her qualifications may be determined and peremptory challenges may be intelligently exercised. *Williams v. Barnes Hospital*, 736 S.W.2d 33, 36 (Mo.banc 1987). Silence on relevant topics covered during *voir dire* is prejudicial because the defendant is thereby deprived of an opportunity to challenge for cause or to exercise a peremptory challenge. *State v. Coy*, 550 S.W.2d 940, 942 (Mo.App. W.D., 1988); *Endres*, 698 S.W.2d at 595.

A trial court is granted broad discretion to decide a juror's qualifications, and its discretion will not be reversed unless that discretion is abused. *State v. Coleman*, 725 S.W.2d 113, 114 (Mo.App. E.D., 1987). The denial of a legitimate motion to strike for cause is an abuse of discretion and constitutes reversible error. *Id.* An abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances before the court and is so arbitrary and unreasonable

as to shock the sense of justice and indicate a lack of careful consideration.

Seaton v. Toma, 988 S.W.2d 560, 561 (Mo.App. S.D., 1999).

Errors in the exclusion of potential jurors should always be made on the side of caution. *State v. Stewart*, 692 S.W.2d 295, 298 (Mo.banc 1985).

Appellate courts have admonished trial courts to be extra prudent and to err on the side of caution in determining whether a juror should be removed. *Coleman*, 725 S.W.2d at 114. A venire person whose ability to be fair and impartial is “questionable” is not qualified to serve and should be struck. *State v. Edwards*, 740 S.W.2d 237, 241 (Mo.App. E.D., 1987).

Juror nondisclosure may be characterized as either intentional or unintentional. *Williams*, 736 S.W.2d at 36. The determination of whether concealment is intentional or nonintentional is left to the discretion of the trial court whose ruling is disturbed by showing abuse of discretion. *Id.*.

Intentional nondisclosure exists, where (1) there exists no reasonable inability to comprehend the information solicited by the question asked of the prospective juror, and (2) it develops that the prospective juror actually remembers the experience or that it was of such significance that her purported forgetfulness is unreasonable. *Williams*, 736 S.W.2d at 36. Unintentional nondisclosure exists where the experience is insignificant, remote in time, or the venireperson reasonably misunderstands the question posed. *Id.*

Whether intentional or unintentional, the concealment of material information on *voir dire* by a prospective juror deprives both parties of the

opportunity to exercise preemptive challenges or challenges for cause in an intelligent and meaningful manner. *Id.*

If a prospective juror intentionally withholds material information requested on *voir dire*, bias and prejudice are inferred and is tantamount to a *per se* rule mandating new trial. *Id.* at 37. If unintentional, a new trial may or may not be warranted. *Id.* Where nondisclosure is found to both unintentional and reasonable, the relevant inquiry becomes whether the juror's presence on the jury did or may have influenced the verdict so as to prejudice the party. *Id.* A new trial is not mandated where the nondisclosed information does not bear on the case or on the prospective juror's ability to fairly evaluate the evidence. *Id.* The determination of prejudice likewise is reviewed for abuse of discretion. *Id.*

At trial, Ms. Avery did not assert that juror Savas' nondisclosure was intentional,¹⁹ therefore the relevant inquiry becomes whether her presence on the jury did or may have influenced the verdict so as to prejudice Ms. Avery.

It is true that juror Savas asserted that her belated realization that she knew Ms. Avery and Ms. Adams would cause her "no problem." But a prospective juror is not the judge of her own qualifications. *Coleman*, 725 S.W.2d at 114; *Seaton*, 988 S.W.2d at 562. *Also see, Murphy v. Florida*, 421 U.S. 794, 800 (1975) (prospective jurors' own assurances that they can be impartial cannot be dispositive of the accused's rights). The trial court must make an independent

¹⁹ But see footnote 20.

evaluation of the juror's qualifications. *Coleman*, 725 S.W.2d at 114. "Narrow appellate review is predicated on this responsibility of the trial court." *Id.* The absence of an independent examination by the trial court requires a more searching appellate review of a challenged juror's qualifications. *Id.*

Here, it can hardly be said the trial court made an independent evaluation of Ms. Savas' qualifications. In essence, the trial court allowed Ms. Savas to make her own determination of whether she was qualified: "I think she has rehabilitated herself in reference to being struck for cause. She says she can set all this aside and make her decision as a juror based solely on the evidence present in court and the instructions given by the Court" (Tr. 873).

And, Ms. Savas' presence on the jury may have influenced the verdict. *Williams*, 736 S.W.2d at 37. The nondisclosed information concerned the case and Ms. Savas' ability to fairly evaluate the evidence. She knew a State's witness, in fact she worked in the same courthouse as that witness. But more importantly, she, as a member of the courthouse staff, had been threatened by a man, whom the circuit clerk believed to be Ms. Avery's fiancé.

Assuming, *arguendo*, that this information would not arise to the level of a strike for cause, if Ms. Savas had given the information during *voir dire*, that information would certainly have influenced the exercise of Ms. Avery's peremptory strikes. A defendant is entitled to all the knowledge which she seeks (once it is passed by the court as a proper question) in order to exercise intelligently her right of peremptory challenge according to her own rights. *Coy*,

550 S.W.2d at 943. The proper questions were asked, but Ms. Savas did not respond until the fourth day of trial. It could hardly be said that Ms. Avery would be unjustified in objecting to Ms. Savas as a juror had this information been in hand at the time of choosing the jury, especially in light of the threats Ms. Avery's purported fiancé had made to the courthouse personnel where Ms. Savas worked. The prospective juror cannot be permitted to become the final arbiter of her own qualifications by withholding pertinent information. *Seaton*, 988 S.W.2d at 562.

What is particularly egregious in this case, resulting in an abuse of discretion, is that there were two alternate jurors available to serve! In *State v. Stewart*, *supra*, the Supreme Court warned trial judges that it is always better to err on the side of caution in criminal cases where replacement jurors can easily be obtained for a prospective juror with doubtful qualifications. *Stewart*, 692 S.W.2d at 298. The trial court's failure to remove juror Savas where there were two alternate jurors shows a lack of careful consideration by the trial court. *Seaton*, 988 SW.2d at 561. The trial court had the opportunity to remedy the problem by allowing an alternate juror to deliberate, yet ill-advisedly failed to do so. The trial court thus abused its discretion. This Court must remand this case for a new trial.

V.

The trial court abused its discretion when it forced Ms. Avery to present one of her exhibits (Exhibit F - her videotaped statement) simultaneously with the State presenting one of its exhibits (Exhibit P-94 - the transcript of the videotape) to the jury, because this deprived Ms. Avery of her fundamental rights to due process, a fair trial, and to present a defense, as guaranteed by the 5th, 6th, and 14th Amendments to the United States Constitution, and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that Ms. Avery offered to allow the State to present the transcript to the jury after she played the videotape; Ms. Avery was entitled to have the jury view her exhibit without the distraction of the State's exhibit so that the evidence could be fairly and fully be considered by the jury; and the State's request to have the jury read the transcript at the same time that Ms. Avery played the videotape was designed solely to distract jurors, as evidenced by the fact that the State had its witness Knowles testify about the contents of the videotape rather than showing it to the jury, and, then the State attempted over the course of two days to prevent Ms. Avery from playing the videotape even though it was the best evidence of her statement and Ms. Avery was entitled to show it under the rule of completeness.

During trial, after State's witness Knowles testified about a videotaped statement Ms. Avery gave to him (Tr. 542-544), Ms. Avery requested to play the

actual videotape (Tr. 545-581). The videotape was clearly the best evidence of what Ms. Avery told Knowles. *State v. King*, 557 S.W.2d 51, 53 (Mo.App. St.L.D., 1977). And, the rule of completeness clearly allowed Ms. Avery to play the videotape of the statement since Knowles had already testified about portions of it. *State v. Collier*, 892 S.W.2d 686 (Mo.App. W.D., 1994). Yet, conspicuously, the State strenuously objected to this request (Tr. 545-581). The State claimed that the videotape was “self-serving,” and that Ms. Avery wanted the jury to see it “for the purposes of showing the jury an apparent vision of remorse on her part by I guess her tearful condition at the time the tape was being made” (Tr. 548). The State further argued that Ms. Avery was only “wanting to show the tape to show the jury how tearful and what kind of state of mind she was in and how remorseful she appeared and her hysterical condition, and that’s all self serving.” (Tr. 554).

Ms. Avery noted that the State had adduced evidence that implied that Ms. Avery fabricated her hysteria and remorsefulness immediately following the shooting, and therefore she was entitled to show the videotape to the jury so that it could decide for itself (Tr. 554). Ms. Avery contended that the jury had a right to hear the videotape and to see what she said (Tr. 567-69).

After requesting an over-night recess, the State contended that if the court overruled its objection, then Ms. Avery should be required to use the transcript of

the videotape rather than the videotape (Tr. 559-565, 578, 580).²⁰ But Ms. Avery believed that it was important for the jury to hear *and see* Ms. Avery's statement, noting that "the written word" could be taken "out of context" (Tr. 568).

After the trial court compared the videotape with the transcript, it noted that while the transcript was "accurate," there were "a number of non-verbal answers" given by Ms. Avery, and therefore Ms. Avery was entitled to play the videotape statement (Tr. 571). The trial court found that the videotape was the best evidence and that the rule of completeness entitled Ms. Avery to play the videotape (Tr. 569, 571, 572).

When Ms. Avery sought to play the videotape to the jury, the State told the jury that it had "no objection" to the videotape statement, after spending two days fighting its admission (Tr. 577-578). Yet, doggedly, the State insisted that the jury read the transcript at the same time that the videotape was being played (Tr. 578). Ms. Avery requested that the videotape be played without the transcript, and then if the State wanted to provide copies of it to the jury, that would be fine (Tr. 578). Ms. Avery noted that there were some non-verbal responses and if the jurors were following the transcript, they would not see those (Tr. 578).²¹

²⁰ It appears that the transcript was prepared during the over-night recess (Tr. 565, 567, 570).

²¹ As with closed captioning television, there is a tendency to read the words on the screen rather than pay close attention to the demeanor of speakers.

The trial court ruled that the jury was entitled to the transcript (Tr. 571, 578). Ms. Avery objected that the State was asking the jury to simultaneously view two exhibits, which would be confusing and prejudicial to Ms. Avery, and was designed to “soften the impact” of the videotape (Tr. 580). Ms. Avery again noted that she had no objection to the jury reading the transcript, but did object to the jury being forced to read a State’s exhibit *at the same time* that Ms. Avery was playing her exhibit to the jury during Knowles’ cross-examination (Tr. 580). The trial court overruled that objection and allowed the transcript to be given to the jury while Ms. Avery’s videotape was played to the jury (Tr. 581).

Ms. Avery raised this claim in her timely motion for new trial (L.F. 140-141; claim 12). Ms. Avery claimed that the trial court erred in permitting the jury to have a copy of the transcript (State’s Exhibit No. P-94) while her videotape exhibit (Defendant’s Exhibit F) was played for the jury (L.F. 140). The State’s request was designed to distract jurors from watching the videotape (L.F. 140). Every exhibit is entitled to be fairly and fully considered by the jury, and therefore the State should not have been allowed to use one of its exhibits to distract the jury’s attention while it was viewing one of Ms. Avery’s exhibits (L.F. 140). This was confusing to the jury, reduced the probative value of Ms. Avery’s exhibit, and effectively allowed the State to prevent Ms. Avery from fully presenting her evidence (L.F. 140-141). As a result, she was deprived of her rights to due process, a fair trial, and to fully present her evidence, as guaranteed by the 5th, 6th, and 14th Amendments to the United States Constitution, and Article I, Section 10

and 18(a) of the Missouri Constitution (L.F. 140-141). This point is properly preserved for appeal.

A trial court enjoys broad discretion in determining the admission or exclusion of evidence. *State v. Ray*, 945 S.W.2d 462, 467 (Mo.App. W.D., 1997). This Court will interfere with the trial court's ruling on the admission or exclusion of evidence when there exists a clear showing of an abuse of that discretion. *Id.* This standard applies to the admissibility of transcripts of tape recordings. *State v. Williams*, 948 S.W.2d 429, 432 (Mo.App. E.D., 1997). An abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Seaton v. Toma*, 988 S.W.2d 560, 561 (Mo.App. S.D., 1999). This Court will not disturb the trial court's ruling unless the abuse resulted in prejudice to the defendant. *Id.* Error in a criminal case is presumed to be prejudicial, unless rebutted by the facts and circumstances of the case. *Ray*, 945 S.W.2d at 469.

"The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 688 (1986) (citing, *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984)). The denial of the opportunity to present relevant and competent evidence may constitute denial of due process. *Ray*, 945 S.W.2d at 469. Further, a defendant has a constitutional right to a fair and impartial trial. *State v. Hill*, 817 S.W.2d 584, 587 (Mo.App. E.D., 1991). If the defendant is deprived of her opportunity to

present evidence, it may violate her rights under the 6th and 14th Amendments to the United States Constitution, and Article I, §§ 10 and 18(a) of the Missouri Constitution. *Id.*

It is true that Ms. Avery was able to play the videotape in front of the jury. It is also true that courts have allowed the State to provide transcripts of tapes *when it is the State who introduces the videotape or audiotape to the jury*. See, *State v. Engleman*, 634 S.W.2d 466 (Mo. 1982). But here the videotape was Ms. Avery's exhibit, and she did not want the jury to view the transcript at the same time she presented her evidence. Ms. Avery did *not* have an objection to the jury receiving the transcript – *after* she had played the videotape. So, the issue is whether a defendant has the right to publish her exhibit without having the State simultaneously publish its exhibit to the jury, thereby not allowing the defense exhibit to be fairly and fully presented to the jury.

In *State v. Crimi*, 655 N.E.2d 230 (Ohio App.3d 1995), a videotape of a high-speed chase was introduced into evidence as a joint exhibit and the jury was allowed to view the tape once. *Id.* at 232. The trial court refused the defense's request to use the tape during cross-examination of the State's witnesses. *Id.* The *Crimi* court reversed on two grounds of error concerning the use of the videotape, including that the trial court abused its discretion when it refused to allow the defense to use it during cross-examination. *Id.* at 235.

Similarly, in Ms. Avery's case, the trial court's ruling was clearly against the logic of the circumstances and was so arbitrary and unreasonable as to shock the

sense of justice and indicates a lack of careful consideration. *Seaton*, 988 S.W.2d at 561. Therefore, the trial court abused its discretion when it limited the manner in which the jury was allowed to view the videotape. The issue then becomes whether Ms. Avery was prejudiced by this abuse of discretion.

The prejudice of the trial court's ruling can be best illustrated by the State's doggedness in attempting to first exclude the videotape, and then to limit its impact on the jury. It is noteworthy that the State had Knowles testify about the contents of the videotape rather than playing the videotape to the jury, even though the videotape was the best evidence of the conversation. *United States v. McMillan*, 508 F.2d 101, 105 (8th Cir. 1974). It is telling that the State preferred to have the witness testify about the statement instead of showing a videotape of it.

Then, the State fought over the course of two days to exclude the videotape even though the rule of completeness clearly allowed the admission of the videotape once the State had introduced the topic into evidence. *Collier, supra*. That the Attorney General's Office would risk injecting such obvious, reversible error into the case in an attempt to preclude the jury from viewing the videotape clearly shows the impact that the State *knew* that the videotape would have. Indeed, in its argument, the assistant attorney general argued that the videotape would "show the jury how tearful and what kind of state of mind [Ms. Avery] was in and how remorseful she appeared and her hysterical condition" (Tr. 548, 554).

Next, after an over night recess requested by the State, the State prepared a transcript of the videotape and the following day insisted that the transcript rather

than the videotape be shown to the jury (Tr. 559-565, 578, 580). The State would stop at nothing in order to prevent the jury from seeing the videotape.

Finally, when the State had lost all of its misguided battles, it insisted on the jury viewing the transcript at the same time that Ms. Avery played the videotape (Tr. 578). This was a clear attempt by the State to distract the jury and to minimize the effectiveness of the videotape. Why else would the State refuse Ms. Avery's compromise to allow the transcript to be shown to the jury but at a different time than when she played the videotape for the jury?

The State's actions in trying to minimize the effect of the videotape shows the prejudicial nature of the trial court's ruling. This Court should reverse and remand for a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse Ms. Avery's convictions and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 18,009 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated on July 9, 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ____ day of July, 2003, to Nicole E. Gorovsky, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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